NOMINATION OF ELENA KAGAN

Mr. HATCH. Madam President, next week the Judiciary Committee will hold its hearing on the nomination of Elena Kagan to replace Supreme Court Justice John Paul Stevens. The Senate's role of advice and consent, especially for Supreme Court Justices, is one of our most important constitutional duties. I wish to share a few thoughts about how I will approach this task.

America's Founders designed the judiciary to be, as Alexander Hamilton described it, the weakest and least dangerous branch of government. Things have not worked out as planned. The judiciary today is, instead, the most powerful, and potentially the most dangerous, branch of our government. Rather than being accountable to the people by being subject to the people's Constitution, activist judges often make the people accountable to them by seeking to control the people's Constitution. My objective in this confirmation process is to find out which kind of Justice Ms. Kagan would be if confirmed to the Supreme Court.

Judicial qualifications fall into two categories: legal experience and judicial philosophy. Legal experience is a summary of what a nominee has done in the past and can be described in a resume or on a questionnaire. Judicial philosophy describes how a nominee will approach the task of judging in the future. It is harder to determine, but I believe it is much more important.

Let me first look at Ms. Kagan's legal experience. I have never believed that judicial experience is necessary for Supreme Court service or, to put it another way, I have never believed it to be a disqualification if you do not have judicial experience. In fact, 39 Supreme Court Justices—about one-third—had no previous judicial experience. What they did have, however, was extensive experience in the actual practice of law, an average of more than 20 years. These are Justices such as George Sutherland, one of my predecessors as Senator from Utah, who practiced for 23 years, or Robert Jackson, who practiced for 21 years and served as both Solicitor General and Attorney General. In other words, Supreme Court Justices have had experience behind the bench as a judge, before the bench as a lawyer, or both.

Ms. Kagan has neither. She spent only 2 years as a new associate in a large law firm. She never litigated a case or argued before any appellate court before becoming Solicitor General last year.

And her work in the Clinton administration was focused on policy and legistation. As the Washington Post described it recently, Ms. Kagan would bring to the Court experience ''in the political circus that often defines Washington.'' Some people may see little difference between the legal and the political, but I do and am concerned about blurring the lines even further.

Last week, one of my Democratic colleagues with whom I serve on the Judiciary Committee talked about Ms. Kagan's qualifications and claimed that some Senators question her fitness for the Supreme Court solely because she has never been a judge. No one has made that argument. This Democratic colleague identified Justices Byron White, William Rehnquist, Louis Brandeis, and Lewis Powell as among those with no prior judicial experience. These Justices had practiced, respectively, for 14, 16, 37, and 39 years and Justice Powell had also been president of the American Bar Association. There really is no comparison.

So on this first element of legal experience, we have to be honest about what the record shows. Unlike other Supreme Court nominees, Ms. Kagan has no judicial experience and virtually no legal practice experience. That leaves her academic and political experience. The Democratic Senator I mentioned identified as among Ms. Kagan's strongest qualifications for the Supreme Court her experience crafting policy and her ability to build consensus. Judges, however, are not supposed to be crafting policy, and consensus-building only begs the question of what a consensus is being built to support.

This relatively light record of legal experience only places more importance on judicial philosophy, the other qualification for judicial service. Frankly, finding reliable clues about judicial philosophy is often harder in an academic and political record such as Ms. Kagan's than in a judicial record. This is especially true when, like Ms. Kagan, a nominee has rarely written directly about the topic. This does not mean that reliable clues do not exist, just that they are harder to find. I have to take Ms. Kagan's record as it is because I have to base my decision on evidence, not blind faith.

Judicial philosophy refers to the process of interpreting and applying the law to decide cases. That is what judges do, but they can do it in radically different ways. Notice I said this is about the process of deciding cases, not the results of those cases. Many people, including some of my Senate colleagues and many in the media, focus only on the results that judges reach, apparently believing that the political ends justify the judicial means.

That is the wrong standard for evaluating either judicial decisions or judicial nominees. Politics can focus on the results, but the law must focus on the process of reaching those results. Rather than the desirable ends justifying the means, the proper means must legitimate the ends. It makes no difference which side wins, which political interest comes out on top, or whether the result can be labeled liberal or conservative. If the judge correctly interprets and applies the law in a particular case, then the result is correct.

So I wish to pin down, as best I can, what kind of Justice Ms. Kagan would be. Will the Constitution control her or will she try to control the Constitution? Will she care more about the judicial process or the political results? As I said, those clues come primarily from her record, secondarily from next week's hearing. So let me briefly focus on a few areas of Ms. Kagan's record and mention some questions that need to be answered and some concerns that need to be addressed.

First, while in graduate school, Ms. Kagan wrote that the Supreme Court may overturn previous decisions ''on the ground that new times and circumstances demand a different interpretation of the Constitution.'' Not a different application, mind you, but a different interpretation. She wrote quite candidly that it is ''not necessarily wrong or invalid'' for judges to ''mold and steer the law in order to promote certain ethical values and achieve certain social ends.''

In a 1995 law journal article, she agreed that in most cases that come before the Supreme Court, the judge's own experience and values become the most important element in the decision. In her words, ''many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value.'' That sounds a lot like President Obama, who said as a Senator that judges decide cases based on their own deepest values, core concerns, the depth and breadth of their empathy, and what is in their heart. If that is too results oriented, Ms. Kagan wrote, so be it.

While Ms. Kagan has not herself been a judge, those judges she has singled out for particular praise have this same activist judicial philosophy. In a tribute she wrote for her mentor Justice Thurgood Marshall, for example, she described his judicial philosophy as driven by the belief that the role of the courts and the very purpose of constitutional interpretation is to ''safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission. . . . And however much some recent Justices have sniped at that vision, it remains a thing of glory.''

In 2006, when she was dean of Harvard Law School, Ms. Kagan praised as her judicial hero Aharon Barak, who served on the Supreme Court of Israel for nearly 30 years. She called him ''the judge or justice in my lifetime whom I think best represents and has best advanced the values of democracy and human rights, of the rule of law, and of justice.'' That is not simply high praise, but the highest praise possible, for she said that Justice Barak was literally the very best judge anywhere during her entire lifetime in representing and advancing the rule of law.

Who is this judge who, for Ms. Kagan at least, is literally the best representation of the rule of law? Judge Richard Posner has described Justice Barak as ''one of the most prominent of the

aggressively interventionist foreign judges'' who ''without a secure constitutional basis. . .created a degree of judicial power undreamt of by our most aggressive Supreme Court justices.'' Judge Posner concluded that to Justice Barak, ''the judiciary is a law unto itself.''

These and other examples, over a period of more than two decades, fit consistently together. They indicate that for most of her career, Ms. Kagan has endorsed, and has praised others who endorse, an activist judicial philosophy. She appears to have accepted that judges may base their decisions on their own sense of fairness or justice, their own values of what is good and right, their own vision of the way society ought to be. This activist philosophy, she has said, is a thing of glory and best represents the rule of law. That is what her record shows, and we will have to see what next week's hearing uncovers on this important subject.

There are also some specific subjects or controversies that must be explored. These might have been less important if Ms. Kagan did not have the record I just described. If she had not endorsed and praised judges making decisions based on their personal values and objectives, then evidence of her own personal values or objectives would obviously be less relevant. But as Ms. Kagan said in a 2004 interview, since a judge's personal attitudes and views make a difference in how they reach their decisions, ''the Senate is right to take an interest in who these people are and what they believe.''

I wish to note two of the areas in which it appears Ms. Kagan's personal or political views have driven her legal views. The first is abortion. When she clerked for Justice Marshall, she recommended against the Court reviewing the decision in a case titled Lanzaro v. Monmouth County Correctional Institutional Inmates. The U.S. Court of Appeals for the Third Circuit held that prison inmates have a right to elective abortions and that by refusing to pay for them, the county violated the Constitution's eighth amendment ban on cruel and unusual punishment. Ms. Kagan properly rejected this bizarre holding, even calling parts of the analysis ludicrous. Yet she urged against the Court reviewing this decision because, as she put it, ''this case is likely to become the vehicle that this court uses to create some very bad law on abortion and/or prisoners' rights.'' Broader policy objectives seemed more important than even reviewing a ludicrous constitutional decision.

The record also shows that later Ms. Kagan was a key player behind the Clinton administration's extreme abortion policy. In May 1997, after President Clinton had vetoed the Partial Birth Abortion Ban Act, Ms. Kagan wrote a memo recommending that he support the substitutes for the ban being offered by Senators Daschle and FEINSTEIN. She recommended this solely for political reasons, because it might attract some votes from Senators who would otherwise vote to override his veto. Had that strategy worked, of course, the substitutes would not have passed and partial birth abortion would have remained legal. The barbaric practice of partial-birth abortion would have remained legal.

Significantly, however, Ms. Kagan noted that the Office of Legal Counsel had concluded that these substitute amendments were unconstitutional under the Supreme Court's Roe v. Wade decision. There is no indication that she disagreed with this conclusion. The point is that Ms. Kagan urged a purely political position on abortion that was at odds with what the Clinton administration then believed the Constitution required. Once again, it looks as though politics trumped the law.

Another controversy involved the military's ability to recruit at Harvard Law School during Ms. Kagan's tenure as dean. Ms. Kagan made her personal views and values as plain as anyone could make them, saying repeatedly that she abhorred the military's policy with regard to homosexuals and calling it a profound wrong and a ''moral injustice of the first order.'' Federal law, known as the Solomon amendment, denies Federal funds to schools with policies or practices that have the effect of preventing military recruiters the same access to campus or to students that other employers have. A group called the Forum for Academic and Institutional Rights, or FAIR, challenged the law in court.

Ms. Kagan first joined a legal brief filed in support of FAIR's challenge with the U.S. Court of Appeals for the Third Circuit. Within 24 hours of the court enjoining enforcement of the Solomon amendment, Ms. Kagan again banned military recruiters from access to Harvard's Office of Career Services. She was not required to do this because the Third Circuit does not include Massachusetts. She kept the ban in place even after the Third Circuit stayed its own injunction while it was being appealed to the Supreme Court. In other words, Ms. Kagan denied military recruiters access even though the law still required access. She could have opposed the military's policy in various ways, but chose to do so in a way that undermined military recruitment during wartime. And the recruitment ban was lifted only after the president of Harvard University stepped in and overrode Ms. Kagan's decision.

Ms. Kagan then joined a group of law professors filing a brief with the Supreme Court. To its credit, FAIR actually agreed with the government about the proper reading of the Solomon amendment. But Ms. Kagan and her fellow professors urged the courts to read the statute in an artificial and unnatural way that actually contradicted both the plain terms of the statute and the position of the very party on whose behalf she had filed her brief. The statute required that the military be treated the same as employers who are granted access to campus. Ms. Kagan argued instead that the military be treated the same as employers who are denied access to campus. Not surprisingly, the Supreme Court unanimously rejected Ms. Kagan's position, saying that her group of law professors simply misinterpreted the statute in a way that would literally negate it and make it ''a largely meaningless exercise.'' She did everything she could, including defying Federal law and making legal arguments that even Justice Stevens could not accept, to pursue her political objective.

In closing, I wanted to come to the floor today to describe for my colleagues the approach I am taking to evaluate Ms. Kagan's nomination to the Supreme Court. The most important qualification for the position is her judicial philosophy, the kind of Justice she will be. The evidence for her judicial philosophy comes primarily from her record, and I have touched on some areas of concern that must be examined more closely.

This is a grave decision. It is about more than simply one person. The liberty we enjoy in America requires that the people govern themselves and that, in turn, depends upon the kind of Justices who sit on the highest court in the land. George Washington said this in his farewell address: ''The basis of our political systems is the right of the people to make and alter their constitutions of government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.'' Judges who bend the Constitution to their own values and who use the Constitution to pursue their own vision for society take this right away from the people and undermine liberty itself.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Texas is recognized.

Mr. CORNYN. I ask unanimous consent to speak for up to 15 minutes as in morning business.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

IMMIGRATION

Mr. CORNYN. Madam President, last week the media reported that 17 Afghan military trainees had gone AWOL—absent without leave—from the Defense Language Institute at Lackland Air Force base in San Antonio, TX. The shocking thing about this is not that 17 Afghan trainees left the military base without leave, but that we hadn't heard anything about it. Even though these officers went missing over a period of 2 years, neither the Department of Homeland Security, the U.S. Air Force, nor the Department of Defense notified me. No one advised the Congress or the American people, to my knowledge, that this had happened. Obviously, it created a lot of consternation and concern.